



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Mycon Construction Co., Inc.

**File:** B-231544

**Date:** June 14, 1988

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### **DIGEST**

1. Protest by fifth low bidder, filed after bid opening, that award to low bidder is contrary to agency policy of granting an evaluation preference to small disadvantaged business concerns is dismissed where solicitation did not provide for such preference.

2. Protest that solicitation should have included an evaluation preference for small disadvantaged business concerns is untimely, since it alleges a solicitation impropriety apparent before bid opening but was not filed before that time.

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### **DECISION**


Mycon Construction Co., Inc., a small disadvantaged business concern, protests the award of a contract to A.O. Ward Construction Co., Inc., the low bidder under invitation for bids (IFB) No. N62467-86-B-0118 for construction work at Keesler Air Force Base in Biloxi, Mississippi. Mycon was the fifth low bidder in the procurement, which was set aside for small businesses. The protester contends that it nevertheless should receive the award because it is entitled to the benefit of a 10 percent bid evaluation preference for small disadvantaged businesses. The preference is provided for in rules issued by the Department of Defense (DOD) to implement section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3973, and section 806 of Pub. L. No. 100-180 (the DOD Authorization Act for fiscal years 1988 and 1989). See 53 Fed. Reg. 5126 (1988).

We dismiss the protest without obtaining a report from the Navy, since it is clear from the material furnished by the protester that the protest is without legal merit. 4 C.F.R. § 21.3(m) (1988).

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The referenced rules provide that whenever the evaluation preference is to be used in a total small business set-aside the contracting officer shall insert a notice to that effect in the solicitation. The Navy's IFB, however, did not provide for the preference, so that the protester has no legal basis for claiming its benefits.

Moreover, to the extent that the protester contends that the solicitation should have provided for the evaluation preference, such a contention concerns a solicitation impropriety that was apparent before bid opening. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1), require that protests based upon such alleged improprieties be filed before that time to enable the contracting agency or our Office to decide an issue while it is most practicable to take effective action where the circumstances warrant. See Ratcliffe Corp.--Request for Reconsideration, B-220060.2, Oct. 8, 1985, 85-2 CPD ¶ 395. Since Mycon's protest was filed after the May 17, 1988, bid opening, the issue is untimely.



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